

## **SENTENCING: Modification of unlawful sentence under Rule 24.3, Arizona Rules of Criminal Procedure — Revised 11/2009**

Rule 24.3, Ariz. R. Crim. P., provides a limited period of sixty days for the trial court to correct “any unlawful sentence or one imposed in an unlawful manner.”<sup>1</sup>

The Comment to Rule 24.3 explains the difference between an “unlawful sentence” and a sentence “imposed in an unlawful manner”:

An unlawful sentence is one not authorized by law; a sentence imposed in an unlawful manner is one imposed without due regard to the procedures required by statute or Rule 26.

A sentence is unlawful when it fails to conform to the mandatory sentencing statutes. See *State v. Carbajal*, 184 Ariz. 117, 907 P.2d 503 (App. 1995); *State v. House*, 169 Ariz. 572, 821 P.2d 233 (App. 1991), *review denied*. In *State v. Carbajal*, *supra*, the defendant pled guilty to three counts of attempted child molestation; the plea agreement said nothing about consecutive sentences. The trial court imposed concurrent sentences even though the statutes mandated consecutive sentences. Two days later, the trial court realized its error and vacated the sentence on its own motion under Rule 24.3. The court gave the defendant an opportunity to withdraw from his guilty plea; when the defendant decided not to withdraw, the trial court imposed the mandatory consecutive sentences. On appeal, the defendant argued that the original sentence was lawfully imposed and that the trial court lacked the power to modify it. The Court of Appeals disagreed, stating, “The failure to impose a sentence in conformity with mandatory sentencing statutes makes the resulting sentence illegal.” *Id.* at 118,

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<sup>1</sup> Rule 24.3. Modification of sentence.

The court may correct any unlawful sentence or one imposed in an unlawful manner within 60 days of the entry of judgment and sentence but before the defendant’s appeal, if any, is perfected. . . .

907 P.2d at 504.

Under Rule 24.3, a sentence is imposed in an unlawful manner when the trial court fails to follow the sentencing procedures required by statute or Rule 26. See *State v. Glasscock*, 168 Ariz. 265, 812 P.2d 1083 (App. 1990). In *Glasscock*, the defendant pled guilty to armed robbery, a class 2 dangerous felony under A.R.S. §13-604. At sentencing, the court, mistakenly thinking the conviction was for a non-dangerous class 2 felony, sentenced the defendant to a believed presumptive 7-year term. No mitigating or aggravating circumstances were presented. A.R.S. §13-702 required that in order for a lower sentence (less than the 10-year actual presumptive term) to be imposed pursuant to A.R.S. §13-604, the judge must find mitigating circumstances to be true, and his factual findings and reasons in support must be set forth in the record at the time of sentencing. Upon realizing its error, the court reviewed evidence in favor of mitigation and sentenced the defendant to a mitigated term of 9 years. On appeal, the defendant argued the court lacked legal authority to change his original sentence. The Court of Appeals disagreed, holding, “[T]he original sentence imposed was done so in an unlawful manner, since it was not imposed in compliance with A.R.S. §13-702(C). We find the court had the power to correct the illegally imposed sentence under Rule 24.3. . . .” *Id.* at 267, 812 P.2d at 1085.

If a lawful sentence has been imposed in a lawful manner, the trial court cannot modify it because the trial court has no inherent power to modify a sentence that was lawfully imposed. *State v. Falkner*, 112 Ariz. 372, 374, 542 P.2d 404, 406 (1975); *State v. House*, 169 Ariz. 572, 573, 821 P.2d 233, 234 (App. 1991).

Despite the Rule’s language referring to the filing of the defendant’s appeal, the

trial court does not lose jurisdiction to modify illegal sentences as soon as the defendant merely files a notice of appeal. The comments to Rule 24.3 explain that the phrase “defendant’s appeal” has been interpreted to mean that the trial court retains power to modify the sentence until the defendant’s appeal has been perfected.<sup>2</sup> An appeal is considered perfected fifteen days after the record of appeal has been filed. See Rule 31.113, Ariz. R. Crim. P. Thus, if a Rule 24 motion has been filed before the appeal is perfected, then the trial court may still consider it. In addition, the Comment to Rule 31.11 explains that, so long as the Rule 24 motion is filed before the appeal is perfected, “[the motion] may be decided by the trial court after perfection whether or not the appeal has been stayed under Rule 31.4(a).” See also *State v. Reynaga*, 111 Ariz. 256, 258, 527 P.2d 764, 766 (1974). However, Rule 24.3 does require the trial court to actually correct the illegal sentence within sixty days of sentencing, as opposed to Rule 24.2, which allows the court to vacate a judgment after the sixty day time period as long as the motion to vacate was properly filed within the time limit to preserve jurisdiction. See *State v. Bryant*, 219 Ariz. 514, 200 P.3d 1011 (App. 2008) (finding that trial court’s entrance of corrective order 115 days after initial order invalid because court failed to amend defendant’s previous illegal sentence within the sixty-day time limit imposed by Rule 24.3, Ariz. R. Crim. P.)

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<sup>2</sup> Compare Rule 24.2 (a), Ariz. R. Crim. P., allowing the trial court to vacate judgment before the defendant’s appeal has been perfected.

<sup>3</sup> Rule 31.11. Perfection of the appeal.

No new matter, other than a petition for post-conviction relief not precluded under rule 32.2, may be filed in the trial court by any party to an appeal later than 15 days after the record on appeal has been filed.